



September 29, 2023

Via email: lcjc@sen.parl.gc.ca

The Honourable Brent Cotter
Chair, Standing Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, ON K1A 0A6

Dear Senator Cotter:

Re: Bill C-48 — Proposed changes to strengthen Canada's bail system

The Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-48, *An Act to amend the Criminal Code (bail reform)*. The *Criminal Code* amendments create new situations where a reverse onus would apply in a bail hearing.

The CBA is a national association of over 37,000 members, including lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The Criminal Justice Section consists of a balance of Crown and defence counsel from every part of the country.

The CBA Section's March 2023 letter to the House of Commons Justice and Human Rights Committee, attached as Appendix A, outlines general principles applying to bail review. In this letter, the CBA Section raises three discrete concerns with Bill C-48.

Proposed Amendment to s. 515(6)(b.1): Prior Discharges for Intimate Partner Violence

Bill C-48 expands the existing reverse onus for repeat intimate partner violence. It adds to *Criminal Code* s. 515(6)(b.1) a prior discharge of an offence in the commission of which violence was used, threatened, or attempted against any intimate partner. While the CBA Section understands the purpose to further protect victims of intimate partner violence, it believes that this amendment is impractical.

The *Criminal Records Act* requires that discharge records be removed from the Canadian Police Information Centre (CPIC) after one year for an absolute discharge, and after three years for a conditional discharge (s. 6.1(2)).¹ Moreover, no record of a discharge shall be disclosed, "nor shall the existence of the record or the fact of a discharge be disclosed to any person, without the prior approval of the Minister", after those time periods expire (s. 6.1(1)).

¹ *Criminal Records Act*, [online](#).

It is unclear whether Bill C-48's amendment contemplates this apparent conflict with the *Criminal Records Act*, and whether *any* prior discharge, even those purged from CPIC and non-disclosable, would therefore put the alleged offender in a reverse onus situation. We anticipate that this conflict will result in confusion and protracted litigation on the admissibility of the records during bail hearings, thus creating further bail delays in an already overburdened and under-resourced system.

Carving out an exception specifically for intimate partner violence would be ill-conceived. A discharge is a finding of guilt, not a criminal conviction, and it does not result in a permanent criminal record. Purging CPIC's information after the time periods expire therefore puts the individual in the legal position of having no criminal record.

An offender charged with another similar offence in the legal retention period, would likely be in breach of a probation order imposed on a conditional discharge. Even if the offender were absolutely discharged in the previous year, this information would be known to the police and Crown at the bail hearing.² As the law stands, nothing prevents the Crown from referring to this relevant information in a bail hearing, and the recent conduct would undoubtedly be relevant to the judicial officer, regardless of whether it is a "Crown onus" or "reverse onus".

Furthermore, a discharge is only imposed under s. 730 of the *Criminal Code*, which states not only that it be in the best interests of the accused, but that it not be contrary to the public interest.³ Discharges, whether absolute or conditional, are not imposed for serious criminal offences. They typically are imposed on first time offenders where the criminal conduct is low level in severity. It is challenging to obtain a discharge where any injuries were sustained by the victim. On the other hand, criminal convictions for past intimate partner violence, as opposed to discharges, are indicative of the level of severity of the past offence.

In our view, adding prior discharges for intimate partner violence in this subsection will have no real practical effect on offenders during the retention period and will conflict with the *Criminal Records Act* for offenders whose records should be purged after the prescribed retention periods. We believe this amendment should be removed.

Proposed Addition of Section 515(6)(b.2)

Bill C-48 adds a new category of reverse onus offences, which would include individuals charged with serious repeat offending involving firearms and other weapons:

with an offence in the commission of which violence was allegedly used, threatened or attempted against a person with the use of a weapon, and the accused has been previously convicted, within five years of the day on which they were charged for that offence, of another offence in the commission of which violence was also used, threatened or attempted against any person with the use of a weapon, if the maximum term of imprisonment for each of those offences is 10 years or more.

This amendment includes those who have previously been sentenced to significant jail-time for a serious violent offence, as well as anyone who received a suspended sentence." This could capture a broad spectrum of conduct, including individuals whose prior criminal conduct may not have been especially serious. This would have the unintended and undesirable effect of significantly overburdening the bail system and creating more delays. We suggest that this amendment be removed.

² While CPIC records are supposed to be purged within these time periods, the practical reality is that prior discharges are often known to local police and Crown offices, and references to the discharges still often appear in disclosure.

³ Justice Law, [online](#).

Proposed Amendments to Section 515(6)(a)(vi): Inclusion of Section 95 (possession) Offences

The CBA Section acknowledges the harmful impact of serious crimes committed with firearms. However, the inclusion of all individuals who are charged with a s. 95 offence in the reverse onus provisions is problematic in our view.

As explained in the CBA Section's March 2023 letter to the House of Commons Justice and Human Rights Committee, attached, where multiple persons are found by police in one location where a firearm is found (i.e., a vehicle, a house, or other building), all of the "found-ins" are typically charged with possession of that firearm, even though the evidence of actual "possession" of the firearm may be tenuous for most of those individuals. Thus, even though a person is charged with "possession" of a prohibited firearm, this should not necessarily result in an automatic "reverse onus" simply by virtue of the offence. In many instances, the accused may have no real connection to the found firearm other than the fact that they happened to be a passenger in a vehicle that was not their own, or an occupant of a household with several other persons. Given this potential overreach, we suggest that the amendment be removed.

Final Observations

Finally, the CBA Section respectfully reminds the Committee that *all individuals*, including persons with a prior criminal record and regardless of its nature, are still *presumed innocent* of the charges laid against them until proven guilty. This presumption applies at every stage of the criminal justice process, including and especially the bail stage. For further elaboration, please see our March 2023 letter.

Yours truly,

(original letter signed by Julie Terrien for Kyla Lee)

Kyla Lee
Chair, Criminal Justice Section